



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R04-OAR-2012-0700; FRL-9771-5]

Approval and Promulgation of Implementation Plans; Kentucky; 110(a)(1) and (2) Infrastructure Requirements for the 2008 8-Hour Ozone National Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve in part, conditionally approve in part, and disapprove in part, the July 17, 2012, State Implementation Plan (SIP) submission provided by the Commonwealth of Kentucky, through the Division of Air Quality (DAQ) of the Kentucky Energy and Environment Cabinet. Kentucky DAQ submitted the July 17, 2012, SIP submission as a replacement to its original September 8, 2009, SIP submission. Specifically, this proposal pertains to the Clean Air Act (CAA or Act) requirements for the 2008 8-hour ozone national ambient air quality standards (NAAQS) infrastructure SIP. The CAA requires that each state adopt and submit a SIP for the implementation, maintenance, and enforcement of each NAAQS promulgated by EPA, which is commonly referred to as an “infrastructure” SIP. Kentucky DAQ made a SIP submission demonstrating that the Kentucky SIP contains provisions that ensure the 2008 8-hour ozone NAAQS are implemented, enforced, and maintained in the Commonwealth (hereafter referred to as “infrastructure submission”). EPA is now proposing three related actions on Kentucky DAQ’s infrastructure SIP submission. First, EPA is proposing to determine that Kentucky DAQ’s infrastructure submission, provided to EPA on July 17, 2012, satisfies

certain required infrastructure elements for the 2008 8-hour ozone NAAQS. Second, with respect to the infrastructure requirements related to specific prevention of significant deterioration (PSD) requirements, EPA is proposing to approve, in part and conditionally approve in part, the infrastructure SIP submission based on a December 19, 2012, Kentucky DAQ commitment to submit specific enforceable measures for approval into the SIP to address specific PSD program deficiencies. Third, EPA is proposing to disapprove Kentucky DAQ's infrastructure SIP submission with respect to certain interstate transport requirements for the 2008 8-hour ozone NAAQS because the submission does not address the statutory provisions with respect to the relevant NAAQS and thus does not satisfy the criteria for approval. The CAA requires EPA to act on this portion of the SIP submission even though under a recent court decision (which is not yet final as EPA has requested rehearing), Kentucky DAQ was not yet required to submit a SIP submission to address these interstate transport requirements. Moreover, under that same court decision, this disapproval does not trigger an obligation for EPA to promulgate a Federal Implementation plan (FIP) to address these interstate transport requirements.

DATES: Written comments must be received on or before [insert date 21 days after date of publication in the Federal Register].

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R04-OAR-2012-0700, by one of the following methods:

1. www.regulations.gov: Follow the on-line instructions for submitting comments.
2. E-mail: R4-RDS@epa.gov.
3. Fax: (404) 562-9140.

4. Mail: “EPA-R04-OAR-2012-0700,” Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960.
 5. Hand Delivery or Courier: Lynorae Benjamin, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960.
- Such deliveries are only accepted during the Regional Office’s normal hours of operation. The Regional Office’s official hours of business are Monday through Friday, 8:30 to 4:30, excluding federal holidays.

Instructions: Direct your comments to Docket ID No. EPA-R04-OAR-2012-0700. EPA’s policy is that all comments received will be included in the public docket without change and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit through www.regulations.gov or e-mail, information that you consider to be CBI or otherwise protected. The www.regulations.gov website is an “anonymous access” system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through www.regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification,

EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

Docket: All documents in the electronic docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: Nacosta C. Ward, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. The telephone number is (404) 562-9140. Ms. Ward can also be reached via electronic mail at ward.nacosta@epa.gov.

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I. Background and Overview

On March 27, 2008, EPA promulgated a revised NAAQS for ozone based on 8-hour average concentrations. EPA revised the level of the 8-hour ozone NAAQS to 0.075 parts per million (ppm). *See* 77 FR 16436. Pursuant to section 110(a)(1) of the CAA, states are required to submit SIPs meeting the applicable requirements of section 110(a)(2) within three years after promulgation of a new or revised NAAQS or within such shorter period as EPA may prescribe. Section 110(a)(2) requires states to address basic SIP elements such as requirements for monitoring, basic program requirements and legal authority that are designed to assure attainment and maintenance of the NAAQS. States were required to submit such SIPs for the 2008 8-hour ozone NAAQS to EPA no later than March 2011.

Midwest Environmental Defense and Sierra Club filed a complaint in federal court on November 20, 2011, alleging EPA's failure to issue findings of failure to submit related to the infrastructure requirements for the 2008 8-hour ozone NAAQS. On December 13, 2011, and March 6, 2012, Midwest Environmental Defense and Sierra Club filed amended complaints alleging that EPA had failed to promulgate PSD regulations required with respect to the 2008 8-hour ozone NAAQS within two years, alleging that EPA had failed to approve or disapprove SIP submittals, and removing claims regarding states that had by that time submitted infrastructure SIPs for the 2008 8-hour ozone NAAQS, respectively. Kentucky was among the states named in the November 2011 complaint, and in the December 2011, and March 2012, amended complaints. Specifically, the plaintiffs claimed that EPA had failed to perform a mandatory duty under section 110(k) to take action upon Kentucky's 2008 8-hour ozone infrastructure SIP addressing sections 110(a)(2)(A)-(H) and (J)-(M) by no later than March 8, 2011.

Kentucky DAQ's infrastructure submission for the 2008 8-hour ozone NAAQS was originally received by EPA on September 8, 2009. Kentucky DAQ's September 8, 2009, SIP revision became complete by operation of law on March 8, 2010, and thus under CAA section 110(k)(2) EPA was required to take action on this SIP revision no later than March 8, 2011. On July 17, 2012, Kentucky DAQ withdrew its September 8, 2009, submission and concurrently provided a new submission to satisfy the infrastructure requirements for the 2008 8-hour ozone NAAQS.¹

¹ EPA understands that Kentucky believed, based upon the 2006 24-hour PM_{2.5} Infrastructure Guidance (the most current infrastructure guidance at the time), it did not need to hold a public hearing for its original letter certification for the 2008 8-hour ozone NAAQS infrastructure SIP (dated September 8, 2009). EPA further understands that, following the publication of EPA's Infrastructure Guidance for the 2008 Lead NAAQS, Kentucky decided to undergo public notice and comment for its 2008 8-hour ozone NAAQS infrastructure SIP. Following that public

On December 7, 2012, EPA was ordered by the U.S. District Court for the Northern District of California (hereafter also referred to as the “district court”) to “sign a final rule or rules taking final action on the 2008 ozone NAAQS Infrastructure SIP submittals from Kentucky (submittal dated 9/8/2009, revised 7/17/2012)... by no later than 3/4/2013.” EPA does not agree that the July 17, 2012, submission “revised” the earlier September 8, 2009, infrastructure submission. Instead, according to the transmittal letter from Kentucky DAQ, the latter submission was a new infrastructure submission sent to EPA to completely replace the earlier September 8, 2009, submission which Kentucky DAQ withdrew. The July 17, 2012, infrastructure submission and accompanying transmittal letter are available in the docket for today’s action. Although Kentucky DAQ clearly stated its intention to replace the original September 8, 2009, submission with the July 17, 2012, submission, EPA interprets the district court order as requiring EPA to act on both infrastructure SIP submittals and to treat the July 17, 2012, submission merely as a revision to the original September 8, 2009, submission, and EPA is proposing to do so in this notice. EPA views the actions proposed today as steps toward satisfying the requirements of the December 7, 2012, district court order regarding Kentucky DAQ’s infrastructure submission.

On December 19, 2012, Kentucky DAQ submitted a request for conditional approval of the infrastructure SIP submission with respect to the PSD requirements of sections 110(a)(2)(C), 110(a)(2)(D)(i)(II) (hereafter referred to as prong 3 of section 110(a)(2)(D)(i)),² and 110(a)(2)(J)

review and comment, on July 17, 2012, Kentucky withdrew its original infrastructure submission, and provided EPA with a new, publically noticed infrastructure submission.

² Section 110(a)(2)(D)(i) includes four requirements referred to as prongs 1 through 4. Prongs 1 and 2 appear in section 110(a)(2)(D)(i)(I); prongs 3 and 4 appear in section 110(a)(2)(D)(i)(II).

to address deficiencies in the infrastructure SIP concerning the fine particulate matter (PM_{2.5}) PSD requirements for these elements. Today's action proposes conditional approval of the Commonwealth's infrastructure SIP submission, consistent with section 110(k)(4) of the CAA, for the portions of the submission related to PSD requirements based upon a commitment by Kentucky DAQ to submit the necessary SIP revisions with specific enforceable measures to address PM_{2.5} PSD requirements. EPA notes that these requirements are part of the structural requirements for the PSD program that are relevant for purposes of infrastructure SIPs for the 2008 8-hour ozone NAAQS.

Kentucky DAQ's July 17, 2012, infrastructure SIP submission for the 2008 8-hour ozone NAAQS also addressed CAA section 110(a)(2)(D)(i)(I), which requires that SIPs contain adequate provisions prohibiting any source or other type of emissions activity in one state from contributing significantly to nonattainment maintenance of the NAAQS in another state. In its submission, Kentucky DAQ asserts that section 110(a)(2)(D)(i)(I) is satisfied by the Commonwealth's previously approved SIP revision to meet the Clean Air Interstate Rule (CAIR) requirements.

CAIR was promulgated by EPA in 2005 to address, for certain states, the requirements of CAA section 110(a)(2)(D)(i)(I) with respect to the 1997 8-hour ozone and 1997 annual PM_{2.5} NAAQS. *See* 70 FR 25162. In 2008, the U.S. Court of Appeals for the D.C. Circuit granted several petitions for review of CAIR; however, the D.C. Circuit ultimately decided to leave CAIR in place to preserve the environmental values of the rule while EPA promulgated a new rule to replace it. *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008), *as modified on rehearing*, 550 F.3d 1176 (D.C. Cir. 2008). In 2011, EPA promulgated the Cross-State Air

Pollution Rule (CSAPR) to replace CAIR and to address, for certain states, the requirements of 110(a)(2)(D)(i)(I) with respect to the 1997 8-hour ozone, the 1997 annual PM_{2.5} NAAQS and the 2006 24-hour PM_{2.5} NAAQS. *See* 76 FR 48208. Neither CAIR nor CSAPR addressed the requirements of 110(a)(2)(D)(i)(I) with respect to the 2008 8-hour ozone NAAQS.

In August of 2012, a panel of the U.S. Court of Appeals for the D.C. Circuit issued a decision to vacate CSAPR. *See EME Homer City Generation, L.P. v. E.P.A.*, 696 F.3d 7 (D.C. Cir. 2012). This decision addressed the requirements of 110(a)(2)(D)(i)(I). The *EME Homer City* panel decision vacated CSAPR and ordered EPA to continue implementing CAIR. The D.C. Circuit has not yet issued the final mandate in *EME Homer City* as EPA (as well as several interveners) petitioned for rehearing *en banc*, asking the full court to review the decision. Nonetheless, while rehearing proceedings are pending, EPA intends to act in accordance with the panel opinion in *EME Homer City* opinion.

Several aspects of the *EME Homer City* opinion are potentially relevant to this proposal. First, the opinion concludes that a section 110(a)(2)(D)(i)(I) SIP submission cannot be considered a “required” SIP submission until EPA has defined a state’s obligations pursuant to that section. *See EME Homer City*, 696 F.3d at 32 (“A SIP logically cannot be deemed to lack a ‘required submission’ or deemed to be deficient for failure to meet the good neighbor obligation before EPA quantifies the good neighbor obligation.”) EPA historically has interpreted section 110(a)(1) of the CAA as establishing the required submittal date for SIPs addressing all of the “interstate transport” requirements in section 110(a)(2)(D), including the provisions in section 110(a)(2)(D)(i)(I) regarding significant contribution to nonattainment and interference with maintenance. However, at this time in light of the *EME Homer City* opinion, EPA is not treating

the section 110(a)(2)(D)(i)(I) SIP submission from Kentucky DAQ as a required SIP submission. Second, the *EME Homer City* opinion provides that EPA does not have authority to promulgate a FIP to address the requirements of section 110(a)(a)(2)(D)(i)(I) until EPA has identified emissions in a state that significantly contribute to nonattainment or interfere with maintenance of the NAAQS in another state and given the state an opportunity to submit a SIP to address those emissions. *EME Homer City*, 696 F.3d at 28.

As explained in greater detail below, in this action, EPA is proposing to disapprove Kentucky DAQ's SIP submission as it relates to section 110(a)(2)(D)(i)(I) because the submission does not address the statutory provisions with respect to the relevant NAAQS and thus does not satisfy the criteria for approval presented in CAA section 110(k)(3). EPA must act on the 110(a)(2)(D)(i)(I) SIP submission from the Commonwealth because, even if the submission is not considered to be "required," section 110(k)(2) of the CAA requires EPA to act on all SIP submissions. However, unless the *EME Homer City* decision is reversed or otherwise modified by the D.C. Circuit, any final disapproval would not obligate the Commonwealth to take any action or make a new SIP submission. Nor would it trigger an obligation for EPA to promulgate a FIP to address these interstate transport requirements.

Kentucky DAQ's July 17, 2012, 2008 8-hour infrastructure submission also addressed sections 110(a)(2)(A)-(B); (D)(i) prong 4;(E)-(H); other sub-elements of (J); and (K)-(M). Today, EPA is proposing to fully approve these elements of the Commonwealth's submission for the reasons explained below.

II. What Elements are Required Under Sections 110(a)(1) and (2)?

Section 110(a) of the CAA requires states to submit SIPs to provide for the implementation, maintenance, and enforcement of a new or revised NAAQS within three years following the promulgation of such NAAQS, or within such shorter period as EPA may prescribe. Section 110(a) imposes the obligation upon states to make a SIP submission to EPA for a new or revised NAAQS, but the contents of that submission may vary depending upon the facts and circumstances. In particular, the data and analytical tools available at the time the state develops and submits the SIP for a new or revised NAAQS affects the content of the submission. The contents of such SIP submissions may also vary depending upon what provisions the state's existing SIP already contains. In the case of the 2008 8-hour ozone NAAQS, states typically have met the basic program elements required in section 110(a)(2) through earlier SIP submissions in connection with the 1997 8-hour ozone NAAQS.

More specifically, section 110(a)(1) provides the procedural and timing requirements for SIPs. Section 110(a)(2) lists specific elements that states must meet for “infrastructure” SIP requirements related to a newly established or revised NAAQS. As mentioned above, these requirements include basic SIP elements such as requirements for monitoring, basic program requirements and legal authority that are designed to assure attainment and maintenance of the NAAQS. The requirements that are the subject of this proposed rulemaking are summarized below.³

³ Two elements identified in section 110(a)(2) are not governed by the three year submission deadline of section 110(a)(1) because SIPs incorporating necessary local nonattainment area controls are not due within three years after promulgation of a new or revised NAAQS, but rather due at the time the nonattainment area plan requirements are due pursuant to section 172. These requirements are: (1) submissions required by section 110(a)(2)(C) to the extent that subsection refers to a permit program as required in part D Title I of the CAA; and (2) submissions required by

- 110(a)(2)(A): Emission limits and other control measures.
- 110(a)(2)(B): Ambient air quality monitoring/data system.
- 110(a)(2)(C): Program for enforcement of control measures.⁴
- 110(a)(2)(D): Interstate transport.⁵
- 110(a)(2)(E): Adequate resources.
- 110(a)(2)(F): Stationary source monitoring system.
- 110(a)(2)(G): Emergency power.
- 110(a)(2)(H): Future SIP revisions.
- 110(a)(2)(I): Areas designated nonattainment and meet the applicable requirements of part D.⁶
- 110(a)(2)(J): Consultation with government officials; public notification; and PSD and visibility protection.
- 110(a)(2)(K): Air quality modeling/data.
- 110(a)(2)(L): Permitting fees.
- 110(a)(2)(M): Consultation/participation by affected local entities.

section 110(a)(2)(I) which pertain to the nonattainment planning requirements of part D, Title I of the CAA. Today's proposed rulemaking does not address infrastructure elements related to section 110(a)(2)(I) or the nonattainment planning requirements of 110(a)(2)(C).

⁴ This rulemaking only addresses requirements for this element as they relate to attainment areas.

⁵ As explained above, EPA at this time is not treating the 110(a)(2)(D)(i)(I) SIP submission from Kentucky DAQ as a required SIP submission. The portions of the SIP submission relating to 110(a)(2)(D)(i)(II) and 110(a)(2)(D)(ii), in contrast, are required, and are being acted upon by EPA in today's proposed rulemaking.

⁶ As mentioned above, this element is not relevant to today's proposed rulemaking.

III. Scope of Infrastructure SIPs

EPA notes that this rulemaking does not address four substantive issues that are not integral to the Commonwealth's infrastructure SIP submission. These four issues are: (i) existing provisions related to excess emissions during periods of start-up, shutdown, or malfunction at sources (SSM), that may be contrary to the CAA and EPA's policies addressing such excess emissions; (ii) existing provisions related to "director's variance" or "director's discretion" that purport to permit revisions to SIP approved emissions limits with limited public process or without requiring further approval by EPA, that may be contrary to the CAA (director's discretion); (iii) existing provisions for minor source new source review (NSR) programs that may be inconsistent with the requirements of the CAA and EPA's regulations that pertain to such programs (minor source NSR); and, (iv) existing provisions for PSD programs that may be inconsistent with current requirements of EPA's "Final NSR Improvement Rule," 67 FR 80186 (December 31, 2002), as amended by 72 FR 32526 (June 13, 2007) (NSR Reform).

Instead, EPA has indicated that it has other authority to address any such existing SIP defects in other rulemakings, as appropriate. A detailed rationale for why these four substantive issues are not part of the scope of infrastructure SIP rulemakings can be found in EPA's August 3, 2012, proposed rule entitled, "Approval and Promulgation of Implementation Plans; Kentucky; 110(a)(1) and (2) Infrastructure Requirements for the 1997 annual and 2006 24-hour Fine Particulate Matter National Ambient Air Quality Standards" in the section entitled, "Scope of Infrastructure SIPs" (*See* 77 FR 46352).

IV. What is EPA’s Analysis of How the Commonwealth of Kentucky Addressed the Elements of Sections 110(a)(1) and (2) “Infrastructure” Provisions?

Kentucky DAQ’s infrastructure submission addresses the provisions of sections 110(a)(1) and (2) as described below.

1. 110(a)(2)(A): *Emission limits and other control measures:* Kentucky DAQ’s infrastructure submission provides an overview of the provisions of the Kentucky Air Regulations relevant to air quality control regulations. The regulations described below have been federally approved in the Kentucky SIP and include enforceable emission limitations and other control measures. Chapter 50 – *Division for Air Quality; General Administrative Procedures* of the Kentucky Air Regulations generally authorizes the Kentucky Energy and Environment Cabinet to adopt rules for the control of air pollution, including those necessary to obtain EPA approval under section 110 of the CAA and details the authority and means with which DAQ can require testing and emissions verification. Chapter 51 – *Attainment and Maintenance of the National Ambient Air Quality Standards*, also includes references to rules adopted by Kentucky DAQ to control air pollution, including ozone precursors. Chapter 53 – *Ambient Air Quality Standards*, serves to establish the requirements for the prevention, abatement, and control of air pollution. EPA has made the preliminary determination that the provisions contained in these chapters and the Commonwealth’s practices are adequate to demonstrate enforceable emission limitations and other control measures for the 2008 8-hour ozone NAAQS in Kentucky. Accordingly, EPA is proposing to approve Kentucky DAQ’s infrastructure SIP submission with respect to section 110(a)(2)(A).

In this action, EPA is not proposing to approve or disapprove any existing state provisions with regard to excess emissions during SSM of operations at a facility. EPA believes that a number of states have SSM provisions which are contrary to the CAA and existing EPA guidance, “State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown” (September 20, 1999), and the Agency plans to address such state regulations in the future. In the meantime, EPA encourages any state having deficient SSM provisions to take steps to correct them as soon as possible.

Additionally, in this action, EPA is not proposing to approve or disapprove any existing state rules with regard to director’s discretion or variance provisions. EPA believes that a number of states have such provisions which are contrary to the CAA and existing EPA guidance (52 FR 45109, November 24, 1987), and the Agency plans to take action in the future to address such state regulations. In the meantime, EPA encourages any state having a director’s discretion or variance provision which is contrary to the CAA and EPA guidance to take steps to correct the deficiency as soon as possible.

2. 110(a)(2)(B) *Ambient air quality monitoring/data system:* Chapter 50:050 – *Monitoring*, Chapter 51:010 – *Attainment status designations*, and Chapter 53 – *Ambient Air Quality Standards*, along with the Commonwealth’s Network Description and Ambient Air Monitoring Network Plan, provide for an ambient air quality monitoring network in Kentucky. Annually, EPA approves the ambient air monitoring network plan for the state agencies. On May 25, 2012, the Commonwealth of Kentucky submitted its plan to EPA, which also included the Louisville-Jefferson County local monitoring program. On June 29, 2012, EPA approved the Commonwealth’s monitoring network plan. The Commonwealth’s approved monitoring network plan can be accessed at www.regulations.gov using Docket ID No. EPA-R04-OAR-

2012-0700. EPA has made the preliminary determination that the Commonwealth's SIP and practices are adequate for the ambient air quality monitoring and data system related to the 2008 8-hour ozone NAAQS. Accordingly, EPA is proposing to approve Kentucky DAQ's infrastructure SIP submission with respect to section 110(a)(2)(B).

3. 110(a)(2)(C) *Program for enforcement of control measures including review of proposed new sources*: Chapter 51 – *Attainment and Maintenance of the National Ambient Air Quality Standards*, describes the permit requirements for new major sources or major modifications of existing sources in areas classified as attainment or unclassifiable under section 107(d)(1)(A)(ii) or (iii) of the CAA. These requirements are designed to ensure that sources in areas attaining the NAAQS at the time of designations prevent any significant deterioration in air quality. Chapter 51 also sets the permitting requirements for areas in or around nonattainment areas and a description of the Commonwealth's statutory authority to enforce regulations relating to attainment and maintenance of the 2008 8-hour ozone NAAQS.

At present, there are four SIP revisions that are relevant to EPA's review of Kentucky DAQ's infrastructure SIP submission for the 2008 8-hour ozone NAAQS in connection with the current PSD-related infrastructure requirements. *See* sections 110(a)(2)(C), prong 3 of 110(a)(2)(D)(i), and 110(a)(2)(J) of the CAA. The EPA regulations that require these SIP revisions are: 1) "Final Rule To Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase 2; Final Rule" (November 29, 2005, 70 FR 71612) (hereafter referred to as the "Phase II Rule"); 2) "Prevention of Significant Deterioration and Title V Greenhouse Gas [GHG] Tailoring Rule; Final Rule" (June 3, 2010, 75 FR 31514) (hereafter referred to as the "GHG Tailoring Rule"); 3) "Implementation of the New Source Review Program for Particulate

Matter Less Than 2.5 Micrometers; Final Rule” (May 16, 2008, 73 FR 28321) (hereafter referred to as the “NSR PM_{2.5} Rule”); and, 4) “Final Rule on the Prevention of Significant Deterioration (PSD) for Particulate Matter Less Than 2.5 Micrometers (PM_{2.5}) – Increments, Significant Impact Levels (SILs) and Significant monitoring Concentration (SMC); Final Rule” (October 20, 2010, 75 FR 64864) (hereafter referred to as the “PM_{2.5} PSD Increment-SILs-SMC Rule (only as it relates to PM_{2.5} Increments)”).

The first revision to the Kentucky SIP (Phase II Rule revisions) was submitted by Kentucky DAQ on February 4, 2010. Kentucky DAQ’s submittal addressed the structural PSD program revisions required by the Phase II Rule, including requirements to include nitrogen oxides (NO_x) as an ozone precursor for permitting purposes for PSD and nonattainment NSR. EPA published a final action approving Kentucky DAQ’s revisions which incorporate NO_x as an ozone precursor on September 15, 2010. *See* 75 FR 55988. Thus, EPA has preliminarily determined that the infrastructure SIP submission is approvable with respect to this issue.

The second revision to the Kentucky SIP pertains to revisions to the PSD program promulgated in the GHG Tailoring Rule, submitted to EPA by Kentucky DAQ on December 13, 2010. EPA published a final action to approve revisions to Kentucky DAQ’s SIP related to GHG regulations on December 29, 2010. *See* 75 FR 81868. The revisions include two significant changes impacting the regulation of GHGs under the Commonwealth’s NSR/PSD program: (1) they provide the Commonwealth with authority to issue PSD permits governing GHGs, and (2) they establish appropriate emission thresholds for determining which new stationary sources and modification projects become subject to Kentucky DAQ’s PSD permitting

requirements for its GHG emissions. Thus, EPA has preliminarily determined that the infrastructure SIP submission is approvable with respect to this issue.

The third revision to the Kentucky SIP pertains to the adoption of PSD and Nonattainment New Source Review (NNSR) requirements related to the implementation of the NSR PM_{2.5} Rule approved in EPA's May 16, 2008, final rule. The fourth revision to the Kentucky SIP pertains to PM_{2.5} PSD Increment-SILs-SMC Rule approved in EPA's October 20, 2010, final rule (only as it relates to PM_{2.5} Increments). Currently, Kentucky DAQ's SIP does not contain provisions to address these structural PSD requirements and thus the infrastructure SIP submission is deficient with respect to these requirements.

On December 19, 2012, however, Kentucky DAQ submitted a commitment letter to EPA requesting conditional approval of the infrastructure SIP submission for the 2008 8-hour ozone NAAQS to address outstanding requirements related to the NSR PM_{2.5} Rule and PM_{2.5} PSD Increment-SILs-SMC Rule (only as it relates to PM_{2.5} Increments).⁷ In its December 19, 2012, letter, Kentucky DAQ described the specific rules that it is developing to address outstanding requirements related to the NSR PM_{2.5} Rule and PM_{2.5} PSD Increment-SILs-SMC Rule (only as it relates to PM_{2.5} Increments), provided its intended schedule and process to address the requirements, and committed to adopt these specific enforceable provisions to address the requirements.⁸ Further, Kentucky DAQ has committed to submitting these SIP revisions to EPA

⁷ The December 19, 2012, commitment letter submitted to EPA by Kentucky DAQ can be accessed at www.regulations.gov using Docket ID No. EPA-R04-OAR-2012-0700.

⁸ The December 19, 2012, comment letter references Kentucky's June 19, 2012, submittal to EPA of the proposed regulatory amendments that the Commonwealth will submit to meet the applicable requirements of the NSR PM_{2.5} Rule and PM_{2.5} PSD Increment-SILs-SMC Rule. Accordingly, EPA's proposed conditional approval related to

for incorporation into the Kentucky SIP by no later than one year from the publication date of EPA's final conditional approval action of the infrastructure SIP for this requirement. Failure by the Commonwealth to adopt these provisions and submit them to EPA for incorporation into the SIP within one year from the publication date of EPA's final conditional approval action would result in this proposed conditional approval being treated as a disapproval. Should that occur, EPA would provide the public with notice of such a disapproval in the Federal Register.⁹ Based on Kentucky DAQ's commitment, EPA is proposing to conditionally approve the Commonwealth's infrastructure SIP submission as it relates to PSD requirements related to 110(a)(2)(C) in accordance with section 110(k)(4) of the Act.

EPA has preliminarily determined that the Kentucky SIP meets the relevant PSD program requirements, with the exception of those SIP revisions described in the commitment letter. Accordingly, in this action EPA is proposing to approve the infrastructure SIP submission as meeting the applicable requirements of section 110(a)(2)(C), but for the remaining narrow issues related to the NSR PM_{2.5} Rule and PM_{2.5} PSD Increment-SILs-SMC Rule. In addition, EPA is proposing to conditionally approve Kentucky DAQ's infrastructure SIP submission for the 2008 8-hour ozone NAAQS with respect to these specific issues related to NSR PM_{2.5} Rule and PM_{2.5} PSD Increment-SILs-SMC Rule based upon the Commonwealth's commitment letter.

these requirements as they pertain to sections 110(a)(2)(C) and (J), and prong 3 of section 110(a)(2)(D)(i), is based upon the Commonwealth's commitment to submit the specific enforceable provisions as described in the December 19, 2012, commitment letter. This letter references the June 19, 2012, proposed regulatory amendments which Kentucky commits to incorporate into the SIP consistent with requirements of section 110(k)(4). The June 19, 2012, submittal is included in the docket for today's proposed rulemaking.

⁹ EPA notes that pursuant to section 110(k)(4), a conditional approval is treated as a disapproval in the event that a State fails to comply with its commitment. Notification of this disapproval action in the Federal Register is not subject to public notice and comment.

EPA is not proposing to approve or disapprove the Commonwealth's existing minor NSR program itself to the extent that it is inconsistent with EPA's regulations governing this program because this is not germane in the context of acting on an infrastructure SIP submission. EPA believes that a number of states may have minor NSR provisions that are contrary to the existing EPA regulations for this program. EPA intends to work with states to reconcile state minor NSR programs with EPA's regulatory provisions for the program. The statutory requirements of section 110(a)(2)(C) provide for considerable flexibility in designing minor NSR programs, and EPA believes it may be time to revisit the regulatory requirements for this program to give the states an appropriate level of flexibility to design a program that meets their particular air quality concerns, while assuring reasonable consistency across the country in protecting the NAAQS with respect to new and modified minor sources. EPA has made the preliminary determination that Kentucky's SIP and practices are adequate for program enforcement of control measures including review of proposed new sources related to the 2008 8-hour ozone NAAQS.

4. 110(a)(2)(D)(i) and (ii) *Interstate and International transport provisions:* Section 110(a)(2)(D) has two components; 110(a)(2)(D)(i) and 110(a)(2)(D)(ii). Section 110(a)(2)(D)(i) includes four distinct components, commonly referred to as "prongs," that must be addressed in SIP submissions. The first two prongs, which are codified in section 110(a)(2)(D)(i)(I), are provisions that prohibit any source or other type of emissions activity in one state from contributing significantly to nonattainment of the NAAQS in another state ("prong 1"), and interfering with maintenance of the NAAQS in another state ("prong 2"). The third and fourth prongs, which are codified in section 110(a)(2)(D)(i)(II), are provisions that prohibit emissions activity in one state interfering with measures required to prevent significant deterioration of air quality in another state ("prong 3"), or to protect visibility in another state ("prong 4"). Section

110(a)(2)(D)(ii) requires SIPs to include provisions insuring compliance with sections 115 and 126 of the Act, relating to interstate and international pollution abatement. EPA's analysis of Kentucky DAQ's infrastructure submission with regard to the requirements of 110(a)(2)(D) is as follows:

110(a)(2)(D)(i)(I): With regard to section 110(a)(2)(D)(i)(I) (prongs 1 and 2), EPA is proposing to disapprove Kentucky DAQ's infrastructure submission for this subsection. In its submission, Kentucky DAQ provides that section 110(a)(2)(D)(i)(I) is met through the Commonwealth's approved regulations to meet the Clean Air Interstate Rule (CAIR) requirements. However, CAIR was promulgated before the 2008 8-hour ozone NAAQS were promulgated, and CAIR did not, in any way, address interstate transport requirements related to the 2008 8-hour ozone NAAQS. The submission from Kentucky DAQ thus does not purport to address the requirements of section 110(a)(2)(D)(i)(I) with respect to the relevant NAAQS. As such, it does not appear to be complete with respect to this element. Nonetheless as the submission has become complete by operation of law, EPA is obligated to act on it pursuant to CAA section 110(k)(2). Because the submission does not address the requirements with respect to the relevant NAAQS and relies exclusively on the CAIR – a rule that was promulgated to address the requirements of 110(a)(2)(D)(i)(I) with respect to earlier NAAQS and found insufficient to do so¹⁰ -- EPA is proposing to disapprove the submission with regard to the requirements of 110(a)(2)(D)(i)(I).

¹⁰ Moreover, in its decision granting the petitions for review of CAIR, the D.C. Circuit held that compliance with CAIR did not constitute compliance with section 110(a)(2)(D)(i)(I) even for the NAAQS that were addressed by CAIR – namely the 1997 ozone and 1997 annual PM_{2.5} NAAQS. *See North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008).

If the opinion in *EME Homer City* is neither reversed nor modified as a result of the pending petitions for rehearing, disapproval of the Kentucky SIP submission as proposed herein will neither obligate the Commonwealth to make a new SIP submission nor trigger EPA's obligation to promulgate a FIP to address the requirements of 110(a)(2)(D)(i)(I) for Kentucky. The D.C. Circuit's recent opinion in *EME Homer City* concluded that EPA cannot promulgate a FIP to address the requirements of 110(a)(2)(D)(i)(I) for a state until sometime after EPA has quantified the emissions that must be prohibited under that provision. *See EME Homer City*, 696 F.3d at 28 ("explaining that EPA must, after quantifying state's obligations under section 110(a)(2)(D)(i)(I) give states an initial opportunity to implement the obligations through SIPs"). For this reason, unless the *EME Homer City* opinion is reversed or modified, the disapproval proposed herein by itself will not trigger any FIP obligation under CAA section 110(c). Thus, EPA disapproval of the infrastructure SIP submission cannot be said to start a "FIP clock" – that is activation of the two year deadline for EPA to promulgate a FIP pursuant to CAA section 110(c). Moreover, and unless the portion of the *EME Homer City* opinion holding that 110(a)(2)(D)(i)(I) SIPs are not required SIP submissions until EPA defines state's obligations pursuant to that section is reversed or otherwise modified, any final disapproval of the section 110(a)(2)(D)(i)(I) portion of the infrastructure SIP submittal will not require Kentucky DAQ to take any additional action related to the requirements of 110(a)(2)(D)(i)(I) for the 2008 8-hour ozone NAAQS.

110(a)(2)(D)(i)(II) – prong 3: With regard to prong 3 of section 110(a)(2)(D)(i), this requirement may be met by the state's confirmation in an infrastructure SIP submission that new major sources and major modifications in the state are subject to a PSD program meeting all the current structural requirements of part C of title I of the CAA or (if the state contains a

nonattainment area for the relevant pollutant) to a NNSR program that implements the 2008 8-hour ozone NAAQS. As discussed in more detail with respect to section 110(a)(2)(C), Kentucky's SIP contains provisions for the Commonwealth's PSD program that reflect relevant SIP revisions most of the structural PSD requirements.¹¹ There are, however, additional relevant PSD program revisions that EPA considers relevant to action on the infrastructure SIP submission for the 2008 8-hour ozone NAAQS. On December 19, 2012, Kentucky DAQ submitted a letter to EPA with a schedule and commitment to make the necessary SIP revisions to include specific enforceable provisions to address the deficiency in the infrastructure SIP submission with respect to the structural requirements for PSD programs required by the NSR PM_{2.5} Rule and the PM_{2.5} PSD Increment-SILs-SMC Rule.

EPA has preliminarily determined that the Kentucky SIP meets the relevant PSD program requirements, but for those SIP revisions described in the December 19, 2012, commitment letter. Accordingly, in this action EPA is proposing to approve the infrastructure SIP submission as meeting the applicable requirements of prong 3 of section 110(a)(2)(D)(i), but for the remaining narrow issues related to the NSR PM_{2.5} Rule and PM_{2.5} PSD Increment-SILs-SMC Rule. In addition, based on the Commonwealth's commitment, EPA is proposing to conditionally approve the Commonwealth's SIP infrastructure submission with respect to prong 3 of section 110(a)(2)(D)(i) consistent with section 110(k)(4) of the Act.

¹¹ See: 1) EPA's approval of Kentucky's PSD/NSR regulations which address the Ozone Implementation NSR Update requirements and 2) EPA's approval of Kentucky's PSD GHG Tailoring Rule revisions which addresses the thresholds for GHG permitting applicability in Kentucky. For additional detailed information on these requirements, see section 3 above.

110(a)(2)(D)(i)(II) – prong 4: Prong 4 of section 110(a)(2)(D)(i) requires that SIPs include provisions prohibiting any source or other type of emissions activity in one state from interfering with measures to protect visibility in another state. In describing how its submission meets this requirement, the Commonwealth referred to EPA-approved provisions requiring electric generating units (EGUs) in Kentucky DAQ to comply with CAIR and to the limited approval and limited disapproval of Kentucky DAQ’s regional haze SIP. Although Kentucky DAQ’s regional haze SIP has not been fully approved, EPA believes that the infrastructure SIP submission together with previously approved SIP provisions, specifically those provisions that require EGUs to comply with CAIR and the additional measures in the regional haze SIP addressing best available retrofit technology (BART) and reasonable progress requirements for other sources or pollutants, are adequate to demonstrate compliance with prong 4, thus, EPA is proposing to fully approve this aspect of the submission.

Kentucky DAQ’s regional haze SIP relied on the Commonwealth’s previous incorporation of the CAIR into the EPA-approved SIP for Kentucky as an alternative to the requirement that the regional haze SIPs provide for source-specific BART emission limits for sulfur dioxide (SO₂) and NO_x emissions from EGUs. At the time the Commonwealth’s regional haze SIP was being developed, the Commonwealth’s reliance on CAIR was fully consistent with EPA’s regulations. CAIR, as originally promulgated, requires significant reductions in emissions of SO₂ and NO_x to limit the interstate transport of these pollutants, and EPA’s determination that states could rely on CAIR as an alternative to requiring BART for CAIR-subject EGUs had specifically been upheld in *Utility Air Regulatory Group v. EPA*, 471 F.3d 1333 (D.C. Cir. 2006). Moreover, the states with Class I areas affected by emissions from

sources in Kentucky had adopted reasonable progress goals for visibility protection that were consistent with the EGU emission limits resulting from CAIR.

In 2008, however, the D.C. Circuit remanded CAIR back to EPA. See *North Carolina v. EPA*, 550 F.3d 1176 (D.C. Cir. 2008). The court found CAIR to be inconsistent with the requirements of the CAA, see *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008), but ultimately remanded the rule to EPA without vacatur because it found that “allowing CAIR to remain in effect until it is replaced by a rule consistent with [the court’s] opinion would at least temporarily preserve the environmental values covered by CAIR.” *North Carolina*, 550 F.3d at 1178.

After the remand of CAIR by the D.C. Circuit and the promulgation by EPA of a new rule – CSAPR – to replace CAIR, EPA issued a limited disapproval of Kentucky DAQ’s regional haze SIP (and other states’ regional haze SIPs that relied similarly on CAIR) because EPA believed that full approval of the SIP was not appropriate in light of the court’s remand of CAIR and the uncertain but limited remaining period of operation of CAIR. EPA finalized a limited approval of the regional haze SIP, indicating that except for its reliance on CAIR, the SIP met CAA requirements for the first planning period of the regional haze program. See 77 FR 19098 (March 30, 2012).¹² EPA also finalized a limited FIP for Kentucky, which merely substituted

¹² Under CAA sections 301(a) and 110(k)(6) and EPA’s long-standing guidance, a limited approval results in approval of the entire SIP submittal, even of those parts that are deficient and prevent EPA from granting a full approval of the SIP revision. *Processing of State Implementation Plan (SIP) Revisions*, EPA Memorandum from John Calcagni, Director, Air Quality Management Division, OAQPS, to Air Division Directors, EPA Regional Offices I-X, September 7, 1992, (1992 Calcagni Memorandum) located at <http://www.epa.gov/ttn/caaa/t1/memoranda/siproc.pdf>.

reliance on EPA's more recent Transport Rule's (also known as CSAPR) NO_x and SO₂ trading programs for EGUs for the SIP's reliance on CAIR. *See* 77 FR 33642, June 7, 2012.

Since the above-described developments with regard to Kentucky DAQ's regional haze SIP, the situation has changed. In August 2012, the D.C. Circuit issued a decision to vacate CSAPR. *See EME Homer City*, 696 F.3d 7. In this decision, the court ordered EPA to "continue administering CAIR pending the promulgation of a valid replacement." Thus, EPA has been ordered by the court to develop a new rule, and to continue implementing CAIR in the meantime, and the opinion makes clear that after promulgating that new rule EPA must provide states an opportunity to draft and submit SIPs to implement that rule. Implementation of CAIR thus cannot be replaced until EPA has promulgated a final rule through a notice-and-comment rulemaking process; states have had an opportunity to draft and submit SIPs; EPA has reviewed the SIPs to determine if they can be approved; and EPA has taken action on the SIPs, including promulgating a FIP, if appropriate.

EPA has filed a petition for rehearing of the court's decision on the Transport Rule. However, based on the current direction from the court to continue administering CAIR, EPA believes that it is appropriate to rely on CAIR emission reductions as permanent and enforceable for purposes of assessing the adequacy of Kentucky DAQ's infrastructure SIP with respect to prong 4 while a valid replacement rule is developed and until implementation plans complying with any new rule are submitted by the states and acted upon by EPA or until the court case is resolved in a way that provides different direction regarding CAIR and CSAPR. In addition, EPA believes that based on the court's decision on CSAPR it would be appropriate to propose to rescind its limited disapproval of Kentucky DAQ's regional haze SIP and propose a full

approval, but EPA is not proceeding to do so at this time because of the possibility that an *en banc* review of the court's decision may have a different outcome that could bear on such action on the regional haze SIP.

As neither the Commonwealth nor EPA has taken any action to remove CAIR from the Kentucky SIP, CAIR remains part of the EPA-approved SIP and can be considered in determining whether the SIP as a whole meets the requirement of prong 4 of 110(a)(2)(D)(i). EPA is proposing to approve the infrastructure SIP submission with respect to prong 4 because Kentucky's regional haze SIP which EPA has given a limited approval in combination with its SIP provisions to implement CAIR adequately prevent sources in Kentucky from interfering with measures adopted by other states to protect visibility during the first planning period. While EPA is not at this time proposing to change the March 30, 2012, limited approval and limited disapproval of Kentucky DAQ's regional haze SIP, EPA expects to propose an appropriate action regarding Kentucky DAQ's regional haze SIP upon final resolution of *EME Homer City*.

110(a)(2)(D)(ii): With regard to 110(a)(2)(D)(ii), Chapter 51:017 – *Prevention of significant deterioration of air quality* of the Kentucky Air Regulations outlines how Kentucky DAQ will notify neighboring states of potential impacts from new or modified sources. The Kentucky SIP also includes federally approved regulations that satisfy the requirements for the NO_x SIP Call. *See* 67 FR 17624 (April 11, 2002). Further, EPA is unaware of any pending obligations for the Commonwealth pursuant to sections 115 or 126 of the CAA. EPA has made the preliminary determination that Kentucky DAQ's SIP and practices are adequate for insuring compliance with the applicable requirements relating to interstate and international pollution abatement for the

2008 8-hour ozone NAAQS. Accordingly, EPA is proposing to approve Kentucky DAQ's infrastructure SIP submission with respect to section 110(a)(2)(D)(ii).

5. 110(a)(2)(E) *Adequate resources:* Section 110(a)(2)(E) requires that each implementation plan provide (i) necessary assurances that the State will have adequate personnel, funding, and authority under state law to carry out its implementation plan, (ii) that the State comply with the requirements respecting State Boards pursuant to section 128 of the Act, and (iii) necessary assurances that, where the State has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the State has responsibility for ensuring adequate implementation of such plan provisions. EPA is proposing to approve Kentucky DAQ's SIP as meeting the requirements of sub-elements 110(a)(2)(E)(i), (ii) and (iii).

In support of EPA's proposal to approve elements 110(a)(2)(E)(i) and (iii), Kentucky DAQ's infrastructure submission demonstrates that it is responsible for promulgating rules and regulations for the NAAQS, emissions standards general policies, a system of permits, fee schedules for the review of plans, and other planning needs. As evidence of the adequacy of Kentucky DAQ's resources with respect to sub-elements (i) and (iii), EPA submitted a letter to Kentucky DAQ on March 14, 2012, outlining 105 grant commitments and current status of these commitments for fiscal year 2011. The letter EPA submitted to Kentucky DAQ can be accessed at www.regulations.gov using Docket ID No. EPA-R04-OAR-2012-0700. Annually, states update these grant commitments based on current SIP requirements, air quality planning, and applicable requirements related to the NAAQS. There were no outstanding issues in relation to the SIP for fiscal year 2011, therefore, Kentucky DAQ's grants were finalized and closed out. EPA has made the preliminary determination that Kentucky has adequate resources for implementation of the 2008 8-hour ozone NAAQS. In addition, the requirements of

110(a)(2)(E)(i) and (iii) are met when EPA performs a completeness determination for each SIP submittal. This determination ensures that each submittal provides evidence that adequate personnel, funding, and legal authority under state law has been used to carry out the state's implementation plan and related issues. Kentucky DAQ's authority is included in all prehearings and final SIP submittal packages for approval by EPA. EPA has made the preliminary determination that Kentucky has adequate resources for implementation of the 2008 8-hour ozone NAAQS. Accordingly, EPA is proposing to approve Kentucky DAQ's infrastructure SIP submission with respect to section 110(a)(2)(E)(i) and (iii).

Section 110(a)(2)(E)(ii) requires that the Commonwealth comply with section 128 of the CAA. Section 128 requires that: 1) the majority of members of the state board or body which approves permits or enforcement orders represent the public interest and do not derive any significant portion of their income from persons subject to permitting or enforcement orders under the CAA; and 2) any potential conflicts of interest by such board or body, or the head of an executive agency with similar, powers be adequately disclosed. Kentucky DAQ's July 17, 2012, infrastructure SIP submission adequately demonstrated that Kentucky's SIP meets the applicable section 128 requirements pursuant to section 110(a)(2)(E)(ii).

For purposes of section 128(a)(1), Kentucky has no boards or bodies with authority over air pollution permits or enforcement actions. Such matters are instead handled by the Director of Division for Air Quality. As such, a "board or body" is not responsible for approving permits or enforcement orders in Kentucky, and the requirements of section 128(a)(1) are not applicable. For purposes of section 128(a)(2), Kentucky DAQ's SIP has recently been updated. On October 3, 2012, , EPA finalized approval of Kentucky DAQ's July 17, 2012, SIP revision requesting

incorporation of KRS Chapters 11A.020, 11A.030, 11A.040 and Chapters 224.10-020 and 224.10-100 into the SIP to address sub-element 110(a)(2)(E)(ii). *See* 77 FR 60307. With the incorporation of these regulations into the Kentucky SIP, EPA has made the preliminary determination that the Commonwealth has adequately addressed the requirements of section 128(a)(2), and accordingly has met the requirements of section 110(a)(2)(E)(ii) with respect to infrastructure SIP requirements. Thus, EPA is proposing approval of Kentucky DAQ's infrastructure SIP submission for the 2008 8-hour ozone NAAQS with respect to this requirement as well.

6. 110(a)(2)(F) *Stationary source monitoring system:* Chapter 50 – *General Administrative Procedures* of the Kentucky Air Regulations describes how the major source and minor source emission inventory programs collect emission data throughout the Commonwealth (including Jefferson County) and ensure the quality of such data. Additionally, the Commonwealth is required to submit emissions data to EPA for purposes of the National Emissions Inventory (NEI). The NEI is EPA's central repository for air emissions data. EPA published the Air Emissions Reporting Rule (AERR) on December 5, 2008, which modified the requirements for collecting and reporting air emissions data (73 FR 76539). The AERR shortened the time states had to report emissions data from 17 to 12 months, giving states one calendar year to submit emissions data. All states are required to submit a comprehensive emissions inventory every three years and report emissions for certain larger sources annually through EPA's online Emissions Inventory System. States report emissions data for the six criteria pollutants and the precursors that form them – NO_x, SO₂, lead, carbon monoxide, particulate matter, and volatile organic compounds. Many states also voluntarily report emissions of hazardous air pollutants. the Commonwealth made its latest update to the NEI on March 14, 2012. EPA compiles the

emissions data, supplementing it where necessary, and releases it to the general public through the website <http://www.epa.gov/ttn/chief/eiinformation.html>. EPA has made the preliminary determination that Kentucky's SIP and practices are adequate for the stationary source monitoring systems related to the 2008 8-hour ozone NAAQS. Accordingly, EPA is proposing to approve Kentucky DAQ's infrastructure SIP submission with respect to section 110(a)(2)(F).

7. 110(a)(2)(G) *Emergency power:* Kentucky's infrastructure submission provides an overview of the Kentucky Air Regulations, specifically Chapter 55 – *Emergency Episodes*, which identifies air pollution emergency episodes and preplanned abatement strategies. The episode criteria specified in this chapter for ozone are based on a 1-hour average ozone level at a monitoring site. These criteria have previously been approved by EPA. EPA has made the preliminary determination that these criteria are adequate to address ozone emergency episodes for the 2008 8-hour ozone NAAQS. As a result, EPA has made the preliminary determination that Kentucky DAQ's SIP and practices are adequate for emergency powers related to the 2008 8-hour ozone NAAQS. Accordingly, EPA is proposing to approve Kentucky DAQ's infrastructure SIP submission with respect to section 110(a)(2)(G).

8. 110(a)(2)(H) *Future SIP revisions:* As previously discussed, Kentucky's DAQ is responsible for adopting air quality rules and revising SIPs as needed to attain or maintain the NAAQS. Kentucky DAQ has the ability and authority to respond to calls for SIP revisions, and has provided a number of SIP revisions over the years for implementation of the NAAQS

Kentucky has one area, Cincinnati, OH-KY-IN, that is designated as nonattainment for the 2008 8-hour ozone NAAQS. This area is classified as marginal nonattainment area and therefore no attainment demonstration SIPs are required. Section 182(a) of the CAA does

require that, for marginal areas, states must submit Base Year Emissions Inventory SIPs, Periodic Emission Inventory SIPs, Emission Statement SIPs, and possibly SIP updates to their NSR program. While the CAA requires these types of SIPs for marginal areas, the specific requirements and compliance dates for these SIPs, as they relate to the 2008 8-hour ozone NAAQS, are not yet established but are expected to be addressed in the upcoming Implementation Rule for the 2008 Ozone NAAQS SIP Requirements. Kentucky DAQ has provided SIP revisions for both the 1-hour ozone and 1997 8-hour ozone NAAQS. EPA has made the preliminary determination that Kentucky DAQ's SIP and practices adequately demonstrate a commitment to provide future SIP revisions related to the 2008 8-hour ozone NAAQS when necessary. Accordingly, EPA is proposing to approve Kentucky DAQ's infrastructure SIP submission with respect to section 110(a)(2)(H).

9. 110(a)(2)(J): EPA is proposing to approve in part, and conditionally approve in part, the Commonwealth's infrastructure SIP for the 2008 8-hour ozone NAAQS with respect to the requirements in section 110(a)(2)(J) to include a program in the SIP that provides for meeting the applicable consultation requirements of section 121, the public notification requirements of section 127, and the PSD and visibility protection requirements of part C of the Act.

110(a)(2)(J) (121 consultation) *Consultation with government officials:* Kentucky Air Regulations Chapter 50 – *Division for Air Quality; General Administrative Procedures* of the Kentucky Air Regulations, and Chapter 51 – *Attainment and Maintenance of the National Ambient Air Quality Standards*, provide for consultation with government officials whose jurisdictions might be affected by SIP development activities. More specifically, Kentucky DAQ adopted state-wide consultation procedures for the implementation of transportation conformity

which includes the consideration of the development of mobile inventories for SIP development. Required partners covered by Kentucky DAQ's consultation procedures include federal, state, and local transportation and air quality agency officials. Additionally, Kentucky DAQ submitted a regional haze plan which outlines its consultation practices with Federal Land Managers. EPA has made the preliminary determination that Kentucky DAQ's SIP and practices adequately demonstrate consultation with government officials related to the 2008 8-hour ozone NAAQS when necessary. Accordingly, EPA is proposing to approve Kentucky DAQ's infrastructure SIP submission with respect to section 110(a)(2)(J) (121 consultation).

110(a)(2)(J) (127 public notification) *Public notification:* The Commonwealth's emergency episode provisions provide for notification to the public when the NAAQS, including the ozone NAAQS, are exceeded. See also the discussion above in regarding section 110(a)(2)(G).

Additionally, the Commonwealth reports daily air quality information on its website at:

<http://air.ky.gov/Pages/AirQualityIndexMonitoring.aspx> to inform the public on the existing air quality within the Commonwealth. EPA has made the preliminary determination that Kentucky DAQ's SIP and practices adequately demonstrate the Commonwealth's ability to provide public notification related to the 2008 8-hour ozone NAAQS when necessary. Accordingly, EPA is proposing to approve Kentucky DAQ's infrastructure SIP submission with respect to section 110(a)(2)(J) (127 public notification).

110(a)(2)(J) (PSD) *PSD:* Kentucky DAQ demonstrates its authority to regulate new and modified sources of ozone to assist in the protection of air quality in Kentucky. Chapter 51 – *Attainment and Maintenance of the National Ambient Air Quality Standards*, describes the permit requirements for new major sources or major modifications of existing sources in areas

classified as attainment or unclassifiable under section 107(d)(1)(A)(ii) or (iii) of the CAA.

These permitting requirements are designed to ensure that sources in areas attaining the NAAQS at the time of designations prevent any significant deterioration in air quality. Chapter 51 also sets the permitting requirements for areas in or around nonattainment areas. Accordingly, this portion of element (J) also requires compliance with the Phase II Rule, the “GHG Tailoring Rule”, the NSR PM_{2.5} Rule, and the PM_{2.5} PSD Increment-SILs-SMC Rule. Two of these SIP revisions¹³ have been approved into the Kentucky SIP and address requisite requirements of the PSD-related requirement of infrastructure element 110(a)(2)(J). As with infrastructure elements 110(a)(2)(C), and prong 3 of 110(a)(2)(D)(i), EPA has preliminarily determined that Kentucky DAQ’s infrastructure SIP submission does not fully meet element 110(a)(2)(J). Kentucky DAQ’s SIP does not include provisions to meet relevant requirements for NSR/PSD program related to the NSR PM_{2.5} Rule and PM_{2.5} PSD Increment-SILs-SMC Rule (only as it relates to PM_{2.5} Increments). As noted above, on December 19, 2012, Kentucky DAQ submitted a letter to EPA providing a schedule to address outstanding PSD program requirements promulgated in the NSR PM_{2.5} Rule and PM_{2.5} PSD Increment-SILs-SMC Rule and committed to provide specific enforceable provisions for incorporation into the SIP to address the outstanding requirements. EPA has preliminarily determined that the Kentucky SIP meets the relevant PSD program requirements, with the exception of those SIP revisions described in the December 19, 2012, commitment letter. Accordingly, in this action EPA is proposing to approve the infrastructure SIP submission as meeting the applicable requirements of section 110(a)(2)(J) (PSD), with the

¹³ (1) EPA’s approval of Kentucky’s PSD/NSR regulations which address the Ozone Implementation NSR Update requirements promulgated in the Phase II Rule and (2) EPA’s approval of Kentucky’s PSD GHG Tailoring Rule revisions which addresses the thresholds for GHG permitting applicability in Kentucky.

exception of the remaining issues related to the NSR PM_{2.5} Rule and PM_{2.5} PSD Increment-SILs-SMC Rule. In addition, EPA is proposing to conditionally approve Kentucky DAQ's infrastructure SIP submission for the 2008 8-hour ozone NAAQS with respect to these specific issues related to NSR PM_{2.5} Rule and PM_{2.5} PSD Increment-SILs-SMC Rule based upon the Commonwealth's commitment letter.

110(a)(2)(J) Visibility protection: With regard to the visibility protection aspect of 110(a)(2)(J), EPA recognizes that states are subject to visibility and regional haze program requirements under part C of the Act (which includes sections 169A and 169B). In the event of the establishment of a new NAAQS, however, the visibility and regional haze program requirements under part C do not change. Thus, EPA finds that there are no applicable visibility obligations under part C “triggered” under section 110(a)(2)(J) when a new NAAQS becomes effective. Kentucky DAQ has submitted SIP revisions to satisfy the requirements of the CAA Section 169A and 169B, and the regional haze and BART rules contained in 40 CFR 51.308. On March 30, 2012, EPA published a final rulemaking regarding Kentucky DAQ's regional haze program, consisting of a limited approval and a limited disapproval. *See* 77 FR 19098. In EPA's view, the current status of Kentucky DAQ's regional haze SIP as having not been fully approved is not a bar to full approval of the infrastructure SIP submission with respect to the visibility protection aspect of 110(a)(2)(J), and EPA is proposing to fully approve the infrastructure SIP for this aspect. While EPA is not at this time proposing to change the March 30, 2012, limited approval and limited disapproval of Kentucky DAQ's Regional haze SIP itself, EPA expects to address the approval status of the regional haze SIP upon final resolution of *EME Homer City*.

10. 110(a)(2)(K) *Air quality and modeling/data:* Kentucky DAQ conducts air quality modeling and reports the results of such modeling to EPA as set forth in Kentucky Air Regulations Chapter 50:040 – *Air Quality Models*. This regulation provides for the use of ambient ozone monitoring is used, in conjunction with pre- and post-construction ambient air monitoring, to track local and regional scale changes in ozone concentrations. Additionally, the Commonwealth supports a regional effort to coordinate the development of emissions inventories and conduct regional modeling for several NAAQS, including the 2008 8-hour ozone NAAQS, for the Southeastern states. Taken as a whole, the Commonwealth’s air quality regulations demonstrate that the Kentucky DAQ has the authority to provide relevant data for the purpose of predicting the effect on ambient air quality of the 8-hour ozone NAAQS. EPA has made the preliminary determination that Kentucky DAQ’s SIP and practices adequately demonstrate the Commonwealth’s ability to provide for air quality and modeling, along with analysis of the associated data, related to the 2008 8-hour ozone NAAQS when necessary. Accordingly, EPA is proposing to approve Kentucky DAQ’s infrastructure SIP submission with respect to section 110(a)(2)(K).

11. 110(a)(2)(L) *Permitting fees:* Kentucky DAQ addresses the review of construction permits as previously discussed in 110(a)(2)(C) above. Permitting fees are collected through the Commonwealth’s title V fees program, which has been federally approved. EPA has made the preliminary determination that Kentucky DAQ’s SIP and practices adequately provide for permitting fees related to the 2008 8-hour ozone NAAQS when necessary. Accordingly, EPA is proposing to approve Kentucky DAQ’s infrastructure SIP submission with respect to section 110(a)(2)(L).

12. 110(a)(2)(M) Consultation/participation by affected local entities: The Kentucky DAQ coordinates with local governments affected by the SIP. More specifically, Kentucky DAQ adopted state-wide consultation procedures for the implementation of transportation conformity which includes the consideration of the development of mobile inventories for SIP development and the requirements that link transportation planning and air quality planning in nonattainment and maintenance areas. EPA approved these procedures in Chapter 50:066 *Conformity of transportation plans, programs, and projects (Amendment)* on April 21, 2010 (75 FR 20180). Required partners covered by Kentucky DAQ's consultation procedures include federal, state, and local transportation and air quality agency officials. The state and local transportation agency officials are most directly impacted by transportation conformity requirements and are required to provide public involvement for their activities including the analysis of how the Commonwealth meets transportation conformity requirements. Additionally, Chapter 65 – *Mobile Source-Related Emissions* also discusses consultation related activities specifically related to mobile sources. EPA has made the preliminary determination that Kentucky DAQ's SIP and practices adequately demonstrate consultation by affected local entities related to the 2008 8-hour ozone NAAQS when necessary. Accordingly, EPA is proposing to approve Kentucky DAQ's infrastructure SIP submission with respect to section 110(a)(2)(J) (127 public notification).

V. Proposed Action

EPA is proposing to approve in part, conditionally approve in part, and disapprove in part, Kentucky DAQ's July 17, 2012, SIP revision submitted to satisfy infrastructure requirements for the 2008 8-hour ozone NAAQS. These proposed actions to approve in part, conditionally approve in part, and disapprove in part the Commonwealth of Kentucky's infrastructure submission are consistent with sections 110(k)(3) and 110(k)(4) of the CAA.

First, EPA is proposing to approve Kentucky DAQ's infrastructure submission with regard to sections 110(a)(2)(A); (B); (D)(i) prong 4; (E) - (H); (J) with the exception of the PSD element; and (K) - (M). EPA has made the preliminary determination that Kentucky DAQ's July 17, 2012, SIP revision meets the infrastructure requirements for the 2008 8-hour ozone NAAQS for all the pertinent sections for 110(a)(2) with the exception of portions of sections 110(a)(2)(C), prong 3 of 110(a)(2)(D)(i), and 110(a)(2)(J), related to the SIP revisions identified in the commitment letter described above; and with the exception of section 110(a)(2)(D)(i)(I).

Second, EPA has preliminarily determined that the Kentucky SIP meets the relevant PSD program requirements of sections 110(a)(2)(C), prong 3 of 110(a)(2)(D)(i), and 110(a)(2)(J), with the exception of those SIP revisions described in the December 19, 2012, commitment letter described above. Accordingly, in this action EPA is proposing to approve the infrastructure SIP submission as meeting the applicable requirements of these sections, with the exception of the remaining issues related to the NSR PM_{2.5} Rule and PM_{2.5} PSD Increment-SILs-SMC Rule. In addition, EPA is proposing to conditionally approve Kentucky DAQ's infrastructure SIP submission for the 2008 8-hour ozone NAAQS with respect to these specific issues related to

NSR PM_{2.5} Rule and PM_{2.5} PSD Increment-SILs-SMC Rule based upon the Commonwealth's commitment letter.

Third, EPA is proposing to disapprove Kentucky DAQ's infrastructure submission as it relates to 110(a)(2)(D)(i)(I) (i.e. prongs 1 and 2 of 110(a)(2)(D)(i)) because the Commonwealth's submission does not address the statutory provisions with respect to the relevant NAAQS and thus does not satisfy the criteria for approval. EPA notes, that unless the *EME Homer City* decision is reversed or otherwise modified, the disapproval proposed herein will not require promulgation of a FIP for Kentucky related to the requirements of 110(a)(2)(D)(i)(I) for the 2008 8-hour ozone NAAQS. Also as EPA is not at this time treating the 110(a)(2)(D)(i)(I) SIP submission as a required submission, no further action will be required on the part of Kentucky related to the requirements of 110(a)(2)(D)(i)(I) for the 2008 8-hour ozone NAAQS.

VI. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this proposed action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by Commonwealth law. For that reason, this proposed action:

- is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);

- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian

country located in the Commonwealth, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate Matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: January 10, 2013

A. Stanley Meiburg
Acting Regional Administrator,
Region 4.

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